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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES,

Plaintiff,

v.

JEFFREY DEAN HUBACEK

Defendant.

CV-S-03-1523-JCM-RJJ

UNITED STATES' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT OF THE MOTION

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. CV-S-
	)	
JEFFREY DEAN HUBACEK	)	
	)	
Defendant.	)	

UNITED STATES' MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION
(Expedited Hearing Requested)

Pursuant to F.R.C.P. 65(a), the United States moves for preliminary injunction against Jeffrey Dean Hubacek. A proposed order granting the preliminary injunction is submitted herewith.

I. INTRODUCTION

Hubacek, an income-tax-return preparer, has prepared at least 80 fraudulent zero-income federal-income-tax returns (Forms 1040) and amended returns (Forms 1040X) since the late 1990s. The preparation and filing of these returns resulted in at least $393,000 in attempted tax

evasion by Hubacek and his customers. Every day that Hubacek continues to prepare returns leads to further irreparable harm to the United States Treasury and to the public. Hubacek's current and future customers are at risk of incurring substantial liabilities for penalties, fines, and interest, in addition to their tax liabilities. Hubacek should be enjoined immediately from preparing federal-income-tax returns or assisting or advising others in preparing federal-income-tax returns. The United States requests that the Court, after an expedited hearing, enter a preliminary injunction barring such activity while this suit is pending.

II. STATEMENT OF THE CASE

Hubacek is an unlicensed and unenrolled tax-return preparer who holds neither a high school nor college degree.[1] He has been preparing returns for customers since the 1990s with at least 40-50 fraudulent zero-income Forms 1040X and at least that many fraudulent zero-income Forms 1040 to his credit.[2] Hubacek charges his customers for his tax-preparation services.[3]

Hubacek's scheme to help his customers evade taxes uses the same frivolous theory that Irwin Schiff, a Las Vegas-based tax-scam promoter, created—the "corporate profit" theory.[4] Schiff's theory rests on the premise that no section of the Internal Revenue Code establishes an

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[1] Declaration of Barbara Hanspire-Transcript of 8/19/2003 Interview p. 7, 32 (Ex. 1) (Hereinafter Trans. 8/19). The attached transcript contains only relevant pages. Irrelevant pages have been omitted.

[2] Trans. 8/19 p. 24-25, Declaration of IRS agent Papp ¶ 4 (Hereinafter Papp Dec.).

[3] Trans. 8/19 p. 18.

[4] *See United States v. Schiff*, 269 F. Supp.2d 1262 (D. Nev. 2003); *United States v. Schiff*, 647 F.2d 73 (2d Cir. 1979); *United States v. Schiff*, 801 F.2d 108 (2d Cir. 1986).

income tax liability on individuals.[5] Hubacek prepares returns that list all zeros, thereby falsely reporting that his customers have no taxable income and therefore no tax liability.[6] He attaches various documents to support the "corporate profit" theory zero-income returns, including a two-page attachment similar to Schiff's attachment.[7] This Court has held that the "corporate profit" theory and its resulting zero-income returns are fraudulent and frivolous.[8]

Hubacek is aware that the "corporate profit" theory is baseless, but he continues to prepare zero-income returns. Hubacek is acquainted with Schiff and knows that Schiff has been enjoined from promoting this scheme.[9] Hubacek has frequently visited Schiff's offices and assisted Schiff by selling various tax products.[10] Further, after this Court granted the injunction against Schiff, Schiff gave Hubacek a copy of the order finding, and clearly stating, that the "corporate profit" theory is baseless.[11] Knowing this, Hubacek has said he may continue his

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[5] *United States v. Schiff*, 269 F. Supp.2d at 1266.

[6] Papp Dec. ¶ 5.

[7] Declaration of Shauana Henline ¶ 6, 10 (Hereinafter Henline Dec.).

[8] *Schiff*, 269 F. Supp.2d 1262.

[9] Trans. 8/19 p. 33. The Ninth Circuit has stayed the injunction pending an appeal by Schiff that his First Amendment rights were violated when he was enjoined from distributing his book, *The Federal Mafia*, promoting his tax-evasion scheme. Schiff does not challenge the validity of the injunction prohibiting him from preparing returns based on the "corporate profit" theory. Reply Brief for Appellant Irwin Schiff, Court of Appeals Doc. #: 03-16319, p. 1 (9th Cir. 11/14/03) ("The crux of this appeal is whether or not Mr. Schiff's book, *The Federal Mafia*, is false and misleading commercial speech...").

[10] Papp Dec. ¶ 11.

[11] Trans. 8/19 p. 33; *See Schiff*, 269 F. Supp.2d 1262 (holding that Schiff knew that his theory that income taxes are voluntary was false).

illegal activities.[12] Hubacek does not believe he is subject to any court ruling.[13]

In addition to preparing fraudulent zero-income returns, Hubacek also refuses to comply with IRS requests for information regarding his scheme. IRS agent Berta Papp interviewed Hubacek on August 19, 2003.[14] After the interview she gave Hubacek a summons that required him to appear before her on September 2, 2003.[15] The summons properly required him to provide the names and taxpayer identification numbers of all customers for whom he prepared returns for the years 2000, 2001, and 2002, and to provide copies of these returns.[16] Hubacek failed to produce the summoned documents on September 2, and he has not provided them thereafter.[17]

The full scope of the harm Hubacek's tax-return preparation has caused the Treasury may never be determined.[18] This is because it is hard to ascertain how many returns and amended returns Hubacek has actually prepared due to the fact that he does not sign or place his tax identification number on all returns.[19] Similarly, because the IRS's computer system does not track amended returns by preparer there is no reliable way to discover how many amended

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[12] Trans. 8/19 p. 18.

[13] Trans. 8/19 p. 8-9.

[14] Papp Dec. ¶ 10.

[15] Papp Dec. ¶ 12.

[16] Papp Dec. ¶ 12.

[17] Papp Dec. ¶ 12, 13.

[18] Papp Dec. ¶ 9.

[19] Trans. 8/19 p. 19-21.

returns Hubacek has prepared.[20] But the IRS's cursory examination of 28 amended and original returns that Hubacek is known to have prepared reveals that he is responsible for at least $393,000 in customer tax understatements.[21] This estimated amount does not take into account the Forms 1040X that the IRS has not yet identified, any unsigned Forms 1040 that Hubacek prepared but did not sign, or any returns for self-employed customers who did not attach a Schedule C.[22] The understated amount will undoubtedly increase as the IRS continues its investigation.

Hubacek will not cease preparing frivolous and fraudulent zero-income returns until he is enjoined. On August 19, 2003 Hubacek admitted under oath to IRS agent Berta Papp that the only returns he knows how to prepare are zero-income returns, and that he may continue preparing such returns.[23] On September 11, 2003 the IRS received two frivolous and fraudulent Hubacek-prepared-amended-zero-income returns.[24] Hubacek did not sign either of the returns.[25] The IRS continues to receive unsigned Hubacek-prepared returns.[26]

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[20] Papp Dec. ¶ 9.

[21] Papp Dec. ¶ 8.

[22] Papp Dec. ¶ 9.

[23] Trans. 8/19 p. 1, 18.

[24] Henline Dec. ¶ 10, 11.

[25] Henline Dec. ¶ 11.

[26] Henline Dec. ¶ 12.

III. ARGUMENT

Due to the urgent need to halt irreparable harm, "a preliminary injunction is customarily granted on ... procedures that are less formal and on evidence that is less complete than a trial on the merits. A party thus is not required to prove his case in full" at the preliminary injunction stage.[27] Further, because 26 U.S.C. §§ 7407 and 7408 set forth criteria for injunctive relief, the United States need only meet the statutes' criteria for a court to issue a preliminary injunction.[28] Since harm to the public interest is presumed in a statutory-injunction case, the United States need only show: (1) a likelihood of success on the merits, and (2) that the equities weigh in favor of granting the temporary relief.[29]

Although 26 U.S.C. § 7402 is a statutory injunction section, one court has required the United States to meet the traditional equitable factors for an injunction under that provision.[30] We believe that such traditional factors need not be considered because 26 U.S.C. § 7402 specifically authorizes injunctions that are "necessary or appropriate" to enforce the internal revenue laws. But even if consideration of traditional equitable factors is required, the United States can easily satisfy the test here.

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[27] *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

[28] *United States v. Estate Preservation Services*, 202 F.3d 1093, 1098 (9th Cir. 2000).

[29] *F.T.C. v. Int'l Charity Consultants*, 1994 WL 263887, * 2 (D. Nev. 1994) *citing F.T.C. v. Worldwide Factors, Ltd.*, [1989-2 TRADE CASES ¶ 68,707], 882 F.2d 344, 346 (9th Cir. 1989).

[30] *United States v. Ernst & Whinney*, 735 F.2d 1296, 1301 (11th Cir. 1984).

A. Injunctive relief is warranted under 26 U.S.C. § 7408 because Hubacek has aided and advised with respect to the preparation of federal-income-tax returns knowing that the information contained therein would result in an understatement of tax liability in violation of 26 U.S.C. § 6701.

Section 7408 authorizes this Court to enjoin persons who have engaged in any conduct subject to penalty under 26 U.S.C. § 6701 if the Court finds that injunctive relief is appropriate to prevent recurrence of the conduct. Section 6701 penalizes any person:

> (1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,
> (2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and
> (3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person...[31]

Hubacek has engaged in conduct subject to penalty under section 6701 by preparing false and fraudulent tax returns for his customers. These returns falsely report that his customers have zero taxable income and zero tax liability. Hubacek knew that such returns would be used in connection with material tax matters, and knew they would result in gross understatements of tax liability. Schiff sent Hubacek a copy of the preliminary injunction finding that the "corporate profit" theory of taxation is baseless. Hubacek ignored the injunction because he states that he is not subject to any court ruling. He further states that he may continue preparing zero-income returns in the future.

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[31] 26 U.S.C. § 6701.

B. Hubacek should be enjoined under 26 U.S.C. § 7407 from preparing any federal-income-tax returns, failing to provide his tax identification number, failing to sign returns that he has prepared, and from failing to keep client lists.

Section 7407 authorizes a court to enjoin a person from acting as an income-tax-return preparer if that person has continually or repeatedly: (1) engaged in conduct subject to penalty under 26 U.S.C. § 6694, which prohibits the preparation or submission of a return containing an unrealistic position, or (2) engaged in conduct subject to penalty under 26 U.S.C. § 6695, which mandates that a return preparer sign returns, include his tax identification number, and keep client lists and turn over such lists to the IRS if summoned. In addition, the court must find that a narrower injunction prohibiting specific misconduct would be insufficient to prevent further interference with federal tax law administration.[32]

Hubacek has continually and repeatedly engaged in conduct subject to penalty under section 6694 by preparing tax returns, for compensation, that falsely claim that his customers have no income and have no federal-income-tax liability. Hubacek knows or should know that zero-income returns are frivolous because courts have repeatedly held that this and similar tax-protestor theories are baseless;[33] he claims he has done extensive research into the tax law; and finally, because the theory is plainly absurd on its face.

Hubacek has continually and repeatedly engaged in conduct subject to penalty under section 6695 by failing to sign or place his tax identification number on tax returns he prepares

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[32] 26 U.S.C. § 7407.

[33] *See United States v. Sullivan*, 274 U.S. 259, 263-264 (1927) (holding that an individual's income is subject to tax), *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 19-20 (1916) (holding that the right of Congress to impose an income tax cannot be doubted), *United States v. Burdett*, 962 F.2d 228 (2d Cir. 1992) (affirming the conviction of an individual who, relying on Irwin Schiff's theories, argued that the individual income tax is voluntary).

and by failing to keep, and produce to the IRS on demand, a list of customers or copies of prepared returns, as he is required to do under 26 U.S.C. § 6107(b).[34]

An injunction prohibiting Hubacek from preparing *any* tax returns is necessary because he has admitted he may continue to prepare fraudulent returns. A narrower injunction, barring only the preparation of zero-income returns, will be ineffective. Hubacek prepares only zero-income returns, he does not know how to prepare any other return. Hubacek's conduct reveals that, as a consumer-protection matter, he should not be preparing any tax returns.

C. Equitable considerations weigh in favor of enjoining Hubacek under 26 U.S.C. § 7402.

Manifesting "a Congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws,"[35] 26 U.S.C. § 7402 "has been used to enjoin interference with tax enforcement even when such interference does not violate any particular tax statute."[36] Injunctive relief under section 7402 is appropriate to prevent Hubacek's interference with tax enforcement.

If the Court finds that traditional equitable factors apply in a section 7402 injunction case, the equitable criteria have been met. First, the United States is likely to prevail on the merits. This Court condemned conduct like Hubacek's when the Court enjoined Irwin Schiff from promoting the "corporate profit" zero-income theory and preparing tax returns based on the

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[34] 26 U.S.C. §§ 6107 and 6695(d).

[35] *Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957).

[36] *Ernst v. Whinney*, 735 F.2d at 1300.

theory.[37] Hubacek knows of the *Schiff* injunction, but still engages in condemned activity. Second, the United States and the public will bear an undue hardship if the requested injunction is not granted. The IRS estimates that Hubacek is responsible for at least $393,000 in understated tax liabilities. This estimate does not count any Forms 1040X that the IRS has not identified, the Forms 1040 he did not sign, and the Forms 1040 prepared for self-employed customers that do not contain a Schedule C. The IRS may never know the full extent of understated tax liability for which Hubacek is responsible. In addition to the harm to the Treasury, if Hubacek is not enjoined he will continue to harm the public. He already has prepared fraudulent and frivolous tax returns for at least 32 customers. His present and future customers are at risk of incurring substantial liabilities for penalties, fines, and interest, in addition to their tax liabilities. Some of these customers may face criminal prosecution. Enjoining Hubacek will serve the public interest.

IV. CONCLUSION

To protect the public and the Treasury from Hubacek's illegal conduct, the Court should grant the Government's motion for preliminary injunction.

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[37] *Schiff*, 269 F. Supp.2d 1262.